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Dear Louise

REMIT Procedural Guidelines and Penalties Statement

Thank you for the opportunity to respond to Ofgem's consultation on its proposed changes to the REMIT Procedural Guidelines and Penalties Statement.

We welcome the additional detail Ofgem proposes to include in these two documents and the clarity this will bring to companies and individuals who are affected by REMIT. It is important for Ofgem to assist companies to understand Ofgem's expectations and the obligations and standards of compliance that are required.

We are continuously working to deliver Ofgem's vision for REMIT, to achieve a culture where energy consumers can put trust in wholesale energy market players to meet their needs first, and to achieve this in line with our obligations.

We broadly agree with the proposed changes, subject to the issues highlighted in our response to the consultation questions, which can be found below.

If you would like to discuss any aspect of our response in further detail please do not hesitate to contact me or my colleague Lois Wares (lois.wares@sse.com).

Yours sincerely

Gillian Hilton
Wholesale Markets Regulation.

Consultation questions

Question 1: Do you agree with the proposed Vision and Strategic Objective for REMIT?

We agree with Ofgem's vision to achieve a culture where energy consumers can put trust in wholesale energy market players to meet their needs first and that this should be achievable in line with their obligations.

We agree with Ofgem's strategic objectives for enforcement under REMIT. In particular we are pleased to note Ofgem's intention to target its enforcement resources and powers to achieve the greatest positive impact. This is in line with Ofgem's guidelines for exercising its REMIT powers, whereby it will have regard to the need to use resources in the most efficient way and the need to be proportionate when imposing any sanctions.

As per our previous responses to Ofgem's consultations on its enforcement guidelines, we continue to believe that a further objective should be included, namely one to ensure that market participants and final consumers of energy can expect a consistent approach to the regulation of REMIT as market participants and final consumers of energy would receive in other EU countries.

Procedural Guidelines

Question 2: Do you have any comments on the proposed changes to the settlement processes?

We welcome Ofgem's proposal that persons under investigation may ask to enter into settlement negotiations at any time and that the discount available will be applied on a sliding scale, depending on when the settlement is reached. Ofgem notes in its guidelines that it will not, however, always be possible to enter into settlement discussions on all cases. We think it would be useful if Ofgem were to set out in its guidelines the type of instances where settlement discussions would not be able to take place.

Question 3: Do you have any comments on our proposals for oral representations?

The proposals seem reasonable.

Question 4: Do you have any other comments on the proposed REMIT Procedural Guidelines?

We have no further comments.

Penalties Statement

Question 5: Do you agree with the proposed factors that effect the decision to impose a financial penalty and/or make restitution or issue a statement of non-compliance?

The proposed factors seem reasonable.

Question 6: Is the proposed process for determining the amount of penalties and/or restitution appropriate?

This seems reasonable.

Question 7: Do you agree with the proposed approach to assessing the seriousness of a breach and calculating the starting point for a financial penalty?

We understand the importance of seeking to maintain confidence in the integrity of the wholesale energy market and therefore the need for a strong deterrent. To this end, we support efforts to try to document the starting point for a firm's financial penalty. However, we do not believe it is appropriate to limit this to fixed percentage levels; we believe this will not allow the penalty to properly reflect the subtleties of individual cases.

In terms of individuals, it seems counter-intuitive to propose a 'starting point' for financial penalties that is "the greater of" a percentage of the individual's relevant income, a multiple of the profit made or loss, or, in the most serious cases, £100,000. In any case, it does not seem appropriate to quantify a starting point.

Finally, it is not clear from paragraphs 6.11 and 6.12 in the Penalties Statement how the 'relevant revenue' will remain appropriate in all cases. It would appear that the 'relevant revenue' (and therefore the starting point for any financial penalty) could be somewhat larger for a one-off non-compliance event when considered proportionately to one that spanned an entire year. It would be better to maintain flexibility by simply stating that the penal element of the fine could comprise of up to 20% of relevant revenue, without specifying particular "gateways". This leaves open the potential of imposing a penalty of 2%, which may be more appropriate than 5% in an individual case. We also note that the Penalties Guidance issued by the OFT (and adopted by the CMA) in relation to the Competition Act (Ref: OFT423), whilst broadly comparable in approach to that adopted by Ofgem on REMIT, retains flexibility by simply fixing a percentage cap. We would suggest that this approach is more appropriate overall and that little benefit can be drawn by pre-determining percentage gateways.

Separately, on "relevant revenue" it would be useful to know how Ofgem intends to approach the determination of how this is calculated in practice. Again taking the OFT423 guidance as a counter-example, we note that there is a reasonable level of assistance

provided to market participants as to what constitutes relevant turnover (para. 2.7 – 2.11). In addition to OFT423, further assistance is also available in the form of a separate guidance note on market definition (OFT403). In relation to one-off events there needs to be flexibility to consider whether it is appropriate to include a full 12 months of “relevant revenue” , or whether this should be looked at on a pro rata basis, i.e. leaving room for “relevant” to be, for example, 6 months of revenue, where this is found to be more appropriate.

Question 8: Do you agree with our proposed approach in relation to representations that a person believed that the behaviour was not a breach or that a person had taken all reasonable precautions and exercised due diligence to avoid the breach?

We are pleased to note that Ofgem will consider any representations that a person reasonably believed that its conduct did not amount to a REMIT breach or that it took all reasonable precautions and exercised all due diligence to avoid such a breach. We think the proposed criteria for evaluating these representations is appropriate but we would like to understand whether it is Ofgem’s expectation that the full list of criteria under 6.24 of the Penalty Statement will have to be met for Ofgem to accept such representations.

Question 9: Do you agree with the factors that may aggravate or mitigate the level of the penal element?

We agree with the proposed aggravating factors but believe Ofgem should provide further clarity on the intention of the following factor:

“the firm’s compliance history includes previous action taken against the firm by the Authority or by other domestic or international regulatory authorities that the Authority considers relevant” (para 6.26)

Whilst we agree that any previous non-compliance of the same type should be taken into consideration when determining the level of the penal element, we would like to ensure that this factor would not allow Ofgem to increase the penal element where action has already been taken by another authority for that same event. Whilst we do not believe this is Ofgem’s intent we would like this to be made clear in the drafting of the Penalty Statement.

We agree with the proposed mitigating factors. We think it would be beneficial to both Ofgem and the industry if Ofgem could share examples of best practice where a firm has offered a level of cooperation well beyond what was expected of them. This shared learning could help reduce investigation time and the resources used by Ofgem and the companies under investigation, and improve market and consumer confidence.

Question 10: Do you agree with the proposed settlement percentage discounts in REMIT cases?



The proposed settlement percentage discounts seem reasonable.

Question 11: Do you agree with our proposed approach to restitution under REMIT?

This appears reasonable.

Question 12: Do you agree with our proposals in respect of serious financial hardship?

Whilst Ofgem has indicated that its starting point for determining whether an individual will suffer serious financial hardship will be based on their net annual income falling below £14,000 and capital falling below £16,000 as a result of payment of the penalty, we would expect Ofgem to evaluate these thresholds on a case by case basis, taking into consideration the individuals personal circumstances and whether such reductions in income would have an unjustifiably adverse effect on the individual or their dependents.

Question 13: Do you have any other comments on the proposed REMIT Penalties Statement?

We have no further comments.

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